In the Supreme Court of the United States.

OCTOBER TERM, 1920.

CHARLES L. BAENDER, APPELLANT,
v.
FRANK BARNETT, SHERIFF, ETC. } No. 614.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLEE.

STATEMENT.

Before advancing to a consideration of the questions sought to be raised by appellant in his present appeal, it seems proper that this court should be apprised of the prior history of the case. Appellant entered a plea of guilty to an indictment which charged that he did "then and there unlawfully, willfully, knowingly, and feloniously, and without lawful authority have in his possession six complete steel dies, each of which was then and there in the likeness and similitude as to the design and the inscription thereon of a die designated for the coining and making of

genuine Indian head design gold coins of the United States," etc. He also filed a demurrer attacking the sufficiency of the indictment, which was overruled, as was also a motion in arrest of judgment. He carried his case to the Circuit Court of Appeals on writ of error. The opinion of that court in 260 Fed. 832 discloses that appellant there, as here, attacked the indictment and statute because of the omission of an allegation that he intended to use the dies to defraud or in the making of counterfeit coins. The appellate court, however, rejected the contention, and affirmed the judgment of conviction. A petition for rehearing was denied. He thereupon applied to this court for a writ of certiorari. In his petition he urged substantially the same constitutional grounds upon which he now relies to have the judgment of conviction upset, but this court denied the writ. (252 U. S. 586.) The refusal of the writ justifies the assertion that the constitutional questions were considered by this court as frivolous, and upon that ground the present appeal should be dismissed. Moreover, viewed in the light of the above history of the case, it is clear that appellant is now seeking to convert a writ of habeas corpus into a writ of error. This he may not be permitted to do. To countenance the practice adopted by appellant in the case at bar is to open the way for a review through two distinct judicial proceedings

of the same questions. With this preliminary statement we proceed to a discussion of the merits.

ARGUMENT.

I.

Congress possesses constitutional power to prohibit, under penalty, mere unlawful possession of the dies here involved even though there be no intent to use such dies unlawfully.

1. At the very outset it is important to bear in mind that appellant pleaded guilty to an indictment charging him with possessing the dies "unlawfully, wilfully, knowingly and feloniously." Therefore, in determining the validity of section 169 of the Criminal Code, upon which the indictment rests, no consideration can be given to the emphasis which appellant, in his brief, seeks to lay upon hypothetical cases which he contends the statute might be made to cover, and if so, would render the statute invalid. This court has repeatedly announced the rule that a party seeking to show the invalidity of an act if applied to a certain class, must bring himself within that class. (*Collins* v. *Texas,* 223 U. S. 288, 295, 296; *Flint* v. *Stone Tracy Company,* 220 U. S. 108, 177.) Appellant did not possess the dies lawfully or unknowingly. Therefore, he can not be heard to argue that the statute is invalid because, from his point of view, it is capable of being applied to one who had such dies "surreptitiously placed on his

person or in his home." (Appellant's brief, pp. 3 and 4.) It is true that in his petition for a writ of habeas corpus he states he explained to the court that the dies were among some junk which he purchased, but the demurrer to the petition does not admit the truthfulness of such explanation, but the mere fact that he made the explanation. The trial court, however, was justified in rejecting the explanation either (1) because it did not believe the explanation, or (2) because the explanation was utterly inconsistent with his plea of guilty. In other words, choosing to stand upon his plea of guilty, he could not be heard to say by way of oral explanation that he was not guilty. This was the disposition of the point made by the court below on habeas corpus. (R. p. 5.)

2. We come then to the question whether Congress may constitutionally, as it has sought to do in section 169 of the Criminal Code of the United States, prohibit under penalty, the *conscious unlawful possession* of the dies therein described. It is appellant's contention that the power of Congress is restricted by the Constitution to providing "for the punishment of counterfeiting the securities and current coin of the United States," and that mere unlawful possession of dies is not closely enough connected with counterfeiting to authorize Congress to punish it as a crime. The contention overlooks the fact that in a separate paragraph of the same Article I, section 8, Congress is given sole power, among other things, "to coin money." This

power necessarily embraces the utilization of every reasonable means to protect to the utmost the instruments, viz, the dies used in coining money, and to forbid others from possessing such dies or replicas of them. If this be not so, then the power of coinage is less complete than other powers conferred by the Constitution, but in no broader terms. On principle the point seems specifically determined by *United States* v. *Arjona,* 120 U. S. 479, 483, in which this court held that under the law of nations, Congress possessed the power to punish mere "having in possession a plate from which may be printed counterfeits of the notes of foreign banks," etc. Surely the power of Congress to coin money is not less embracing in the matter of protecting the instruments, viz, dies used in such work. Nor is that power pared down by the constitutional provision authorizing the punishment of counterfeiting, assuming arguendo as asserted by appellant, that mere possession of dies is too remote from the act of counterfeiting to be connected therewith. Is it not true that the provision of the Constitution authorizing Congress to provide for the punishment of counterfeiting, is merely declaratory of a power necessarily embraced in the power to coin money? There seems no escape from the conclusion that the power of Congress to coin money carries with it the power to forbid others to do so. And if it may forbid others from coining money, necessarily to effectively prohibit, it may forbid the possession of dies capable of no other use than in

coining money. It is far afield to argue, as appellant does, that the specific power to punish counterfeiting can be used to pare down and render somewhat impotent the specific power to coin money. Stated somewhat differently, if section 169 of the Criminal Code is a proper exercise, as it clearly seems to be, of the power to coin money, then such exercise is not to be rendered nugatory because in a separate clause power to punish the distinct act of counterfeiting is conferred. The point is well illustrated by the following excerpt from *Legal Tender Cases,* 12 Wall. 457, 544, 545:

> They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary, it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. There an express power to punish a certain class of crimes (the only direct reference to criminal legis-

> lation contained in the Constitution) was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect. To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation is an attempt to introduce a new rule of construction against the solemn decisions of this court.

See *United States* v. *Marigold*, 9 How. 559, 566, 567.

3. As further demonstrating that the power to coin money authorizes the enactment of section 169 of the Criminal Code here involved, attention is directed to legislation passed pursuant to other constitutional powers not more embracing in their language. By paragraph 7 of section 8, Article I, Congress is merely given power to establish post offices and post roads, and yet under that power this court has approvingly noticed in *Lewis Publishing Company* v. *Morgan*, 229 U. S. 288, 301, the following concrete exertions:

> Under that six-word grant of power the great Postal System of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employes, the carriage of more than fifteen billions of pieces of mail

> matter per year, weighing over two billions of pounds, the incorporation of railroads, the establishment of the Rural Free Delivery System, the money-order system, by which more than a half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcel post, an aeroplane mail service * * *.

Not only so, but there must not be overlooked the numerous so-called postal crimes created by sections 179–231, inclusive, of the Criminal Code of the United States. Those crimes are not more closely connected with the effective exercise of the power to establish post offices and post roads than the crime involved in the case at bar is connected with the power to coin money.

Other instances may be found approved in *Legal Tender cases*, 12 Wall. 457 et seq.

II.

Prohibition of mere possession not a new principle in the exercise of legislative power.

Repeated instances might be cited where both Federal and State legislatures, in the effective exercise of their constitutional powers, have deemed it necessary to prohibit, under penalty, the mere possession of certain specified articles. The instance upheld in *Crane* v. *Campbell*, 245 U. S. 304, is particularly pertinent. This court said:

> And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to

say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge.

As the power to coin money is vested solely in Congress there is no escape from the conclusion that no citizen possesses the right, as against the prohibition of Congress, to have and to hold dies used in the coining of money, or replicas of them. The coinage power can not be effectively protected and preserved, if such dies or replicas may be indiscriminately possessed by unauthorized persons, such as appellant.

III.

It is respectively submitted that no adequate ground is shown for upsetting the judgment of conviction. The appeal should be dismissed on the ground that the constitutional question attempted to be raised is frivolous, or the judgment below affirmed.

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